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NO. 87-764

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

STATE OF FLORIDA, Petitioner,

v.

MICHAEL A. RILEY, Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

The question presented in Florida's petition for writ of certiorari was:

> Whether the Florida Supreme Court's holding -- that ground observations from a helicopter at a lawful altitude of 400 feet over residential backyards violate reasonable expectations of privacy within the meaning of the Fourth Amendment -- conflicts with California v. Ciraolo, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

This question may be rephrased:

1. Whether this Court should decide that warrantless naked-eyed aerial observation is permissible under the Fourth Amendment so long as the police observer has the legal right to be in the place from which the observation is made.
2. Whether this Court should reject the rules suggested by the Florida Supreme Court as to warrantless naked-eye aerial observations that:

- An observation from a fixed-wing aircraft in space where it may lawfully be is constitutional but an observation from a helicopter in space where it may lawfully be is not; and
- An observation made on a casual patrol is constitutional but an observation made on a purposeful patrol "targeted" on specific marijuana cultivating operations is not.

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OPINIONS BELOW

The opinion of the Florida Supreme Court (J.A. 110-139) is reported as Riley v. State, 511 So.2d 282 (Fla. 1987). The opinion of the Florida District Court of Appeal, Second District (J.A. 99-109), styled State v. Riley, is reported at 476 So. 2d 1354 (Fla. 2d DCA 1985). The opinion of the Florida Circuit Court for Pasco County on pretrial motion to suppress (J.A.

92-98), styled State v. Riley, is not reported, but is reprinted verbatim in the body of the District Court's published opinion at 476 So.2d 1354, 1354-55.

JURISDICTION

This Court has jurisdiction to review the decision of the Florida Supreme Court on writ of certiorari under 28 U.S.C. § 1257(3). The decision of the Florida Supreme Court, quashing the decision of the Florida District Court of Appeal and remanding this case for reinstatement of the trial court's suppression order, was rendered on July 9, 1987. J.A. 110. After denial of its motion for rehearing, Florida filed a petition for a writ of certiorari, which this Court granted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment is applicable to the states by virtue of the Fourteenth Amendment to the United States Constitution. It provides, in part:

> Section 1 - No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article I, Section 12 of the Florida Constitution provides:

> SECTION 12. Searches and seizures. The right of the people to be secure in their persons, houses,

papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places or be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

49 U.S.C. § 1301(29), relied upon by the Florida Supreme Court, provides:

> (29) "Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft.

14 C.F.R. § 91.79, relied upon by the Florida Supreme Court, provides:

> 91.79 Minimum safe altitude; general.
>
> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> (a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
>
> (b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.
>
> (c) Over other than congested areas. An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.
>
> (d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to person or property on

the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the administrator.

STATEMENT OF THE CASE

The trial court made a succinct statement of facts, which the District Court of Appeal reprinted verbatim:

> The Defendant, MICHAEL RILEY, rented and occupied a parcel of property containing in excess of five (5) acres. A portion of this property contained a mobile home, occupied by the Defendant as a dwelling, and certain out-buildings. The property is located in a rural area and contained numerous trees and shrubs.
>
> The portion of the property containing the mobile home and out-buildings was enclosed or partially enclosed by a net wire fence. One of the photographs of the property depicts a "DO NOT ENTER" sign posted in an area in front of the mobile home.
>
> The major out-building is located about 10' to 20' to the rear of the mobile home. This building is enclosed on two sides. One of the remaining sides is

> open to an area of trees and shrubbery (within the fenced area) which obscure it from view, and the fourth side is screened by the mobile home and by one or more trees located between the greenhouse and the mobile home. The roof of the greenhouse is constructed of corrugated roofing, a portion of which is translucent and a portion of which is opaque. There are two openings in the roof which appear to be caused by either removing or not installing two of the corrugated roofing panels. The combined open space amounts to approximately one-tenth of the total roof area. The testimony before the Court indicates that the contents of this greenhouse were not visible from any adjacent property.
>
> Deputy Kurt Gell of the Pasco County Sheriff's Office, acting upon information which had been received by another deputy, investigated the property for possible violation of statutes prohibiting cultivation of cannabis. The deputy and a pilot employed by the Pasco County Sheriff's Office approached the property by helicopter at an altitude of approximately 400 feet. As the helicopter approached the property, Deputy Gell, using a camera with a telephoto lens, took photographs of the mobile home and greenhouse. The evidence is unclear as to whether the helicopter descended below 400

> feet, but it did circle over the greenhouse twice while the deputy observed the property. Deputy Gell testified that through the openings in the roof and through one or more of the open sides of the greenhouse, he could see and identify growing marijuana plants. At this point the deputy left the subject property and prepared an affidavit which was the basis for the issuance of a search warrant.
>
> On August 16, 1984, pursuant to the execution of the search warrant, the evidence sought to be suppressed by the Defendant was seized. Said evidence included 44 marijuana plants found growing in the greenhouse.

J.A. 92-95, reprinted in J.A. 100-102.

Certain other facts (or the lack thereof) seem relevant, as may be gleaned from the minimal record.[1/]

[1/] The record consists of the fifty-page transcript of the suppression hearing (J.A. 11-91) (much of it legal argument), at which only the deputy sheriff, Kurt Gell, and the defendant, Michael Riley, testified and documentary evidence consisting of a number of photographs (two of which were taken from the air, the balance being taken from the ground after a search warrant was obtained and executed).

a. Deputy Gell had over 14 years experience as a police officer, had observed marijuana as a police officer 100 times, and had in unrelated investigations observed marijuana in the course of aerial observations from airplanes or helicopters on approximately six prior occasions. J.A. 38.

b. The marijuana plants observed here were, in the words of the prosecutor, "at least the height of this greenhouse, [plants] approximately six to twelve feet tall." J.A. 78-79 (emphasis added). This statement is fully supported by the photographic exhibits. See, e.g., Def. Ex. 6; State's Ex. 17.

c. As the trial court found, 10% of the top of the greenhouse was exposed to Deputy Gell's view, the opening apparently being caused by the conscious act of "removing or not installing" part of the

roof. Furthermore, two of the four sides of the greenhouse were open to the air. J.A. 42-43, 93-94, 101.

d. As the District Court of Appeal noted, Deputy Sheriff Gell testified and the trial judge "specifically accepted as true the deputy's statement that he could see the marijuana plants from his position of aerial surveillance." J.A. 88, 104; see J.A. 24, 26, 29-31, 34. In other words, although the deputy took two aerial photographs using a camera with a telephoto lens, he could see these 6-12 foot plants with his naked eye.2/

e. The only direct evidence of a subjective intention to conceal the marijuana cultivating operations was the "DO NOT ENTER" sign noted by the trial judge. Riley did not testify as to his subjective

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2/ The Florida Supreme Court noted this factual ruling. J.A. 113 n. 2.

intent or desire. The Florida courts inferred a subjective intent from the net wire fence around (or partially around) the perimeter of the over five-acre tract, the enclosure of two sides, the partial obscuration of the other two sides, and the corrugated roofing of most of the top of the greenhouse.

f. Riley had an oral lease on the over five-acre tract. J.A. 47-48. After moving into the mobile home on the property, he himself built the greenhouse near the mobile home. Id.

g. There was no evidence as to the type of helicopter involved or its capacity to hover. In fact it did not hover, but instead, as the trial court found (J.A. 94-95), it circled the greenhouse twice. J.A. 32.

h. There was no evidence that Deputy Gell photographed any property but Riley's.

None of the photographs shows anyone else's property (nor, considering the size and rural nature of the property, would that have been likely).

i. The Florida Supreme Court made four statements about aerial observation. None was based on any record evidence:

1. aerial surveillance is "more susceptible to abuse and invasion of privacy than ground surveillance. . . . " (J.A. 130);

2. helicopter surveillance is "particularly likely to unreasonably intrude upon private activities. . . ." (J.A. 130);

3. helicopters' "virtually unlimited maneuverability and operational capabilities" invade privacy (J.A. 131); and

4. those justices "do not believe" one could "as easily" see what

was seen here from a fixed-wing aircraft as from a helicopter. J.A. 133.

Riley was charged by information on August 16, 1984 with two counts of violating Section 893.13, Florida Statutes (1983) (the unlawful manufacture and possession of marijuana). J.A. 3-6. Riley filed a motion to suppress evidence, asserting the warrantless aerial observation constituted a "search." J.A. 7-10.

Despite this rather simple and straightforward factual framework, the three Florida courts below reached exceedingly different legal conclusions.

The trial court, writing in December 1984, granted the motion to suppress (J.A. 91-98), holding Riley had "exhibited an actual and reasonable expectation of privacy in an area which is protected by the Fourth Amendment and the [Florida] Declaration of Rights." J.A. 95. The trial court further

observed, "Clearly, the greenhouse is within the curtilage and is therefore a constitutionally protected area." J.A. 95-96. While concluding, "Defendant herein has manifested a reasonable expectation of privacy from aerial surveillance" (J.A. 96-97), the trial court expressly did "not reach the question of whether circling over the subject property at an altitude of 400 feet or less is in itself an invasion of a constitutionally protected area." Id.

The District Court of Appeal, writing in October 1985, unanimously reversed the trial court's suppression order. J.A. 99-109. Finding the Fourth Amendment aerial surveillance question to be one of great public importance, the District Court certified it to the Florida Supreme Court. Fla.R.App.P. 9.030(a)(2)(A)(v).

Neither the District Court's nor the trial court's decisions, nor Riley's motion

or briefs in these courts and the Florida Supreme Court, made any reference whatsoever to any federal "navigable airspace" statutory scheme or to any "minimum altitude" regulations. This was not an issue until the Florida Supreme Court spoke.

The Florida Supreme Court, writing in July 1987 (almost three years after the police aerial observations in question), unanimously quashed the District Court's decision and remanded with instructions to reinstate the trial court's suppression order.[3/]

3/ The decision below rested on the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution. J.A. 111. This section of the Florida Constitution requires that the search and seizure provisions of the Florida Constitution be construed in conformity with the Fourth Amendment to the United States Constitution as interpreted by this Court. Since Florida law is dependent upon the construction given the Fourth Amendment, this Court has power to review the judgment of the Florida Supreme Court under Article I, Section 12. See,

(continued...)

Unlike the lower Florida courts, the Florida Supreme Court discussed this Court's decisions, including in particular (i) Riley's reliance on Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) ("Katz"), and (ii) this Court's two intervening Fourth Amendment decisions upholding warrantless aerial surveillance, California v. Ciraolo, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) ("Ciraolo"), and Dow Chemical Co. v. United States, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986) ("Dow").

In the Florida Supreme Court's view, Ciraolo and Dow, far from vindicating Florida, demonstrated its violation of Riley's Fourth Amendment privacy rights because the police helicopter here -- unlike the fixed-wing aircraft in those

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3/ (...continued)
e.g., Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

cases -- had not been in "navigable airspace" as defined in the United States Code in pari materia with Federal Aviation Agency ("FAA") regulations (as interpreted by that court). For this holding, the Florida Supreme Court explicitly followed the intervening decision in People v. Sabo, 185 Cal. App. 3d 845, 230 Cal. Rptr. 170 (Cal. 4th Dist. Ct. App. 1986), cert. denied sub nom. California v. Sabo, ___ U.S. ___, 107 S.Ct. 2200, 95 L.Ed.2d 855 (1987) ("Sabo").4/ On the basis of Sabo, the

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4/ Recently another California appellate court reached the opposite conclusion from Sabo (and the Florida Supreme Court here) on virtually identical facts. People v. Romo, 198 Cal. App. 3d 581, 243 Cal. Rptr. 801 (Cal. 1st Dist. Ct. App. 1988), pet. for review denied (Cal. Apr. 27, 1988) (No. S004819) ("Romo"). Compounding the confusion, another division of the same appellate district that decided Romo followed Sabo. People v. Roberts, 195 Cal. App. 3d 479, 240 Cal. Rptr. 658 (Cal. 1st Dist. Ct. App. 1987). (This latter case, however, construed the California Constitution before its amendment by "Proposition 8").

Florida Supreme Court explained its decision in terms of "navigable airspace."

Explicitly following Sabo "under circumstances nearly identical to those here," (J.A. 131-32), the Florida Supreme Court concluded, citing no factual basis, "Although petitioner [Riley] may not have had a legitimate expectation that his greenhouse would not be viewed from a fixed-wing aircraft flying in navigable public airspace, we do not find unreasonable his expectation that its contents would not be examined from a helicopter hovering below 500 feet." J.A. 133-34. "Recognizing that the question in this case is a close one, . . ." (J.A. 137), the decision below nevertheless held, "In circling and descending below 'public navigable airspace,'5/ Detective Gell impermissibly

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5/ The court stated the helicopter was not in public navigable airspace because (continued...)

invaded Riley's privacy and his observations thus constituted a search under the [F]ourth Amendment to the federal [C]onstitution and [A]rticle I, [S]ection 12 of the Florida Constitution." J.A. 137-38.

SUMMARY OF THE ARGUMENT

Florida, like most states,6/ is heavily dependent on use of aircraft to detect marijuana cultivating operations as the first step in their eradication. Florida draws no distinctions between types of

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5/ (...continued)
it was below the minimum altitude level for fixed-wing aircraft. Based on the concern for technological advances expressed in Katz, supra, the Florida Supreme Court concluded that, even though the officers were in a place they had a right to be and made an observation that any member of the public in that space could have made, the observation by a helicopter flying at a lawful altitude violated Riley's Fourth Amendment right to privacy.

6/ See State of Indiana's Brief on behalf of itself and 29 other states and commonwealths as amici curiae filed this week in this case.

aircraft used. Both fixed-wing aircraft and helicopters are utilized; both have their functions. In all cases, Florida intends that aircraft be operated lawfully under FAA regulations, that is, that they be piloted in areas where they legally may be. For fixed-wing aircraft this is in "navigable airspace" (1000 feet in urban, 500 feet in rural areas). For helicopters this is at less than the minimums of "navigable airspace," so long as without surface hazard to persons and property.

Florida submits that people today live in the constant presence of both fixed-wing aircraft and helicopters and can have no objectively reasonable expectation of privacy as to matters viewable by unaided vision from any aircraft positioned where it lawfully may be. Florida therefore asks that the decision below be reversed and a bright line rule be adopted that

warrantless naked-eye aerial observation is valid under the Fourth Amendment so long as the aircraft is operated where it lawfully may be.

A bright line rule is sought because police pilots require one and because the courts require one. A host of cases have tested the constitutionality of aerial observations. Confusion exists in the courts as to the rules for helicopters, as most clearly shown by three recent totally contradictory California court decisions and by the decision below. That decision, while purporting to follow this Court's decision in Ciraolo, effectively held helicopters cannot be used to conduct aerial observations unless they fly at minimums required only of fixed-wing aircraft. Under that decision, helicopters, unlike fixed-wing aircraft, may not observe from places where they lawfully may be.

The decision below utilized bright line rules, determining that aerial observations (i) from a helicopter flying below fixed-wing minimums, or (ii) as the result of a flight "targeted" on specific suspected property, are unconstitutional. Neither of these limiting bright line rules withstands analysis and both should be rejected.

The decision also concluded that marijuana cultivating operations exposed to the open-air near a trailer in which the cultivator resides, all on an over-five acre tract with a (possibly incomplete) perimeter fence rented by the cultivator on a verbal lease constituted part of the curtilage. Florida submits this conclusion is in error, is contrary to the basic rationale of curtilage, and under Ciraolo is not the relevant issue.

ARGUMENT

Introduction

This case may be characterized in various ways. How one characterizes this case may well determine the result. Such a result is undesirable just because it is so potentially unpredictable.

This is, for example, a "helicopter case" and the Florida Supreme Court has concluded there is -- for Fourth Amendment search purposes -- a constitutional difference between airplanes and helicopters.

This is also a "drug case," the target of the aerial observation being suspected marijuana cultivating operations of Riley. That this case involves alleged illegal manufacture and possession of marijuana theoretically should hold no special significance for constitutional and analytical purposes under the Fourth Amendment. Yet, empirically, it seems no

coincidence that most aerial observation cases do involve marijuana cultivation--and increasingly also involve greenhouses and functional near-equivalents.

This is also one of a growing number of "greenhouse cases," in which police may utilize aerial observations of the contents of sheds and like structures not viewable from the ground.

Above all, this case is about the legitimacy of asserted or perceived expectations (subjective and objective) of privacy in a world where air traffic is omnipresent.

Aerial surveillance is a new application of the broad constitutional principles behind the prohibition of warrantless search and seizure. First alluded to in Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), this Court

focused on the issue in Ciraolo and Dow.7/

While the law reviews differ as to what factors ought to be taken into account, or are simply hostile to the idea of warrantless aerial surveillance altogether,8/ the academic search for meaningful criteria goes on.9/

7/ Note, Aerial Surveillance Withstands Fourth Amendment Scrutiny, 23 Tulsa L. J. 259, 281 (Wint. 1987).

8/ See, e.g., Note, California v. Ciraolo, [106 S.Ct. 1809]: The Demise of Private Property, 47 La. L. Rev. 1365 (Jul. 1987); Note, Search and Seizure -- Aerial Surveillance -- Administrative Inspections-- Dow Chemical v. United States, 106 S.Ct. 1819, 27 Nat. Resources J. 693 (Summ. '87).

9/ E.g., Note, Constitutional Law-- Search and Seizure -- Warrantless Aerial Surveillance -- California v. Ciraolo, 106 S.Ct. 1809 (1986), 54 Tenn. L. Rev. 131 (1986); Note, Criminal Procedure-- Warrantless Aerial Surveillance Endorsed-- California v. Ciraolo, 9 Campbell L. Rev. 497 (1987); Note, Eyes in the Sky, The Fourth Amendment in the Age of Aerial Surveillance, 52 Mo. L. Rev. 507 (1987); Note, Fourth Amendment -- The Constitutionality of Warrantless Aerial Surveillance -- California v. Ciraolo, 106 C. Ct. 1809 (1986), 77 Sup. Ct. Rev. 602 (continued...)

Florida submits this Court should now seize the opportunity afforded by this case to furnish the criteria by articulating suitably neutral Fourth Amendment principles governing police aerial observations in the light of reasonable expectations of privacy.

I. WARRANTLESS NAKED-EYE AERIAL OBSERVATION IS PERMISSIBLE WHENEVER THE POLICE OBSERVER IS WHERE HE HAS A RIGHT TO BE.

A. Ciraolo Establishes The Rule That Warrantless Naked-Eye Aerial Observation From A Lawful, Public Vantage Point Is Contitutionally Permissible.

Ciraolo set the rule which governs this case, that an aerial observation by unaided vision violates no reasonable expectation of privacy:

9/(...continued)
(1986); Note, In Plane View: Is Aerial Surveillance a Violation of the Fourth Amendment? -- California v. Ciraolo, 40 Sw. L. J. 1133 (1986).

> The touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." Katz v. United States, 389 U.S. 347, 360 S.Ct. 507, 516, 19 L.Ed.2 576 (1967) (Harlan, J., concurring). Katz posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? See Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed. 2d 220 (1979).
>
> . . . .
>
> We turn, therefore, to the second inquiry under Katz, i.e., whether that expectation is reasonable. In pursuing this inquiry, we must keep in mind that "[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity," but instead "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment."
>
> . . . .
>
> That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require

law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. . . . "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz, supra, 389 U.S., at 351, 88 S.Ct., at 511.

. . . . That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed.

Ciraolo, 476 U.S. 211-14, 106 S.Ct. at 1811-13, 90 L.Ed.2d at 215-17 (some case citations omitted).

The Florida Supreme Court acknowledged that, unlike fixed-wing aircraft which must fly in "navigable airspace," "'[t]he

lawfully operated helicopter need stand back only such distance as not to hazard persons or property.'" J. A. 133, quoting Sabo, supra. That determination, had Ciraolo been accurately followed, would have compelled the opposite answer to the Fourth Amendment question than that which the Florida Supreme Court reached.

B. There Was Not And Could Not Be Any Reasonable Expectation Of Privacy From Naked-Eye Aerial Observation From A Lawful, Public Vantage Point.

There was only the barest evidence that Riley showed even a subjective expectation of privacy, the first prong of the Katz test. The incidents of privacy were (i) Riley's mobile home and greenhouse were within an over-five acre tract, (ii) a net wire fence extended around or partly around the perimeter of the tract, (iii) a "DO NOT ENTER" sign was posted, (iv) two

of the sides of the greenhouse were closed, shrubbery partially covered a third, and the view of the fourth was obscured by the mobile home, and (v) most of the roof was covered. The first three items are merely physical facts or show an intent to exclude trespassers, not viewers. The last two are contradicted by the fact two sides of the greenhouse were not covered and were exposed to view (J.A. 32, 39), and there was enough uncovered space in the roof, as well as the two open-air sides, that one could see in with unaided aerial vision. J.A. 29, 31-32, 41.

If those facts suffice to show a subjective expectation of privacy from aerial observation, then this Court might as well say that prong is self-proving by bare bones allegations. See J.A. 9, ¶ 9. In fact, this Court has expressed healthy skepticism of claims of subjective

expectation on facts far more likely to corroborate such claims.10/

But assuming the existence of subjective expectation, Riley could have had no reasonable objective expectation of privacy from warrantless naked-eye aerial observation, the second prong of the Katz test. Riley could not reasonably assume an observer from an aerial vantage point could not see in through the roof he built and which he did not fully cover, and through the two sides he chose not to close, so as to identify the 6-12 foot plants for what they were.

10/ E.g., Ciraolo, supra, 476 U.S. at 211-12, 106 S.Ct. at 1812, 90 L.Ed.2d at 216 ("Whether respondent therefore manifested a subjective expectation of privacy from all observations of his backyard, or whether instead he manifested merely a hope that no one would observe his unlawful gardening pursuits, is not entirely clear in these circumstances.") (emphasis in original).

officers stated they could observe marijuana growing through the openings in the roof of the greenhouse, a search warrant was secured.

7. There was no probable cause for issuance of said search warrant.

8. It was impossible for the officers of the Pasco County Sheriff's Department to have a reasonable belief that marijuana was growing at the defendant's residence.

9. The above procedures used by the Pasco County Sheriff's Department in attempting to collect information concerning the possession of marijuana by the defendant intruded upon an area in which the defendant had a reasonable expectation of privacy and the defendant's constitutional rights.

10. Any marijuana seized from the defendant's residence was seized illegally and in violation of the defendant's rights

under the United States Constitution and the Laws of the State of Florida.

WHEREFORE, the defendant moves this Honorable Court for an Order suppressing any and all marijuana seized from the defendant or from the defendant's residence.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, 7530 Little Road, New Port Richey, FL by personal service, this 6th day of December, 1984.

/s/ Marc Salton
MARC H. SALTON
4911 C.R. 54
New Port Richey, FL 33552
(813) 842-2412

IN THE CIRCUIT COURT OF THE SIXTH
JUDICIAL CIRCUIT IN AND FOR
PASCO COUNTY, FLORIDA

STATE OF FLORIDA) Case No. 84-1606CFAWS
)
vs.)
)
MICHAEL RILEY)
)

O R D E R

THIS MATTER coming on to be heard on the 14th day of December, 1984, upon the Defendant's Motion to Suppress, and the Court being duly advised in the premises, the Court finds that the testimony and photographic evidence introduced in this case establish the following:

The Defendant, MICHAEL RILEY, rented and occupied a parcel of property containing in excess of five (5) acres. A portion of this property contained a mobile home, occupied by the Defendant as a dwelling, and certain out-buildings. The property is located in a rural area and contained numerous trees and shrubs.

The portion of the property containing the mobile home and out-buildings was enclosed or partially enclosed by a net wire fence. One of the photographs of the property depicts a "DO NOT ENTER" sign posted in an area in front of the mobile home.

The major out-building is located about 10' to 20' to the rear of the mobile home. This building is enclosed on two sides. One of the remaining sides is open to an area of trees and shrubbery (within the fenced area) which obscure it from view, and the fourth side is screened by the mobile home and by one or more trees located between the greenhouse and the mobile home. The roof of the greenhouse is constructed of corrugated roofing, a portion of which is translucent and a portion of which is opaque. There are two openings in the roof which appear to be caused by either removing or not

installing two of the corrugated roofing panels. The combined open space amounts to approximately one-tenth of the total roof area. The testimony before the Court indicates that the contents of this greenhouse were not visible from any adjacent property.

Deputy Kurt Gell of the Pasco County Sheriff's Office, acting upon information which had been received by another deputy, investigated the property for possible violation of statutes prohibiting cultivation of cannabis. The deputy and a pilot employed by the Pasco County Sheriff's Office approached the property by helicopter at an altitude of approximately 400 feet. As the helicopter approached the property, Deputy Gell, using a camera with a telephoto lens, took photographs of the mobile home and greenhouse. The evidence is unclear as to whether the helicopter descended below 400

feet, but it did circle over the greenhouse twice while the deputy observed the property. Deputy Gell testified that through the openings in the roof and through one or more of the open sides of the greenhouse, he could see and identify growing marijuana plants. At this point the deputy left the subject property and prepared an affidavit which was the basis for the issuance of a search warrant.

On August 16, 1984, pursuant to the execution of the search warrant, the evidence sought to be suppressed by the Defendant was seized. Said evidence included 44 marijuana plants found growing in the greenhouse.

Based on these facts, the Court holds:

That the Defendant exhibited an actual and reasonable expectation of privacy in an area which is protected by the Fourth Amendment and the Declaration

of Rights. Clearly, the greenhouse is within the curtilage and is therefore a constitutionally protected area. In addition, the roof or covering over the area in which the plants were located is a clear indicium of a desire for privacy from observation from the air. The structure, having two open sides, affords its contents scant protection from inclement weather and serves no purpose other than to obstruct the view of its contents. Likewise the purpose of the opening in the roof was not to allow a viewing of the contents but was to admit sunlight (compare the plastic sheets in Huffer v. State, 344 So.2d 1332 [Fla. 2d DCA 1977]) and possibly permit circulation of air.

The Court notes that this case is distinguishable from the cases of Diehl v. State, 9 FLW 2505, 1 DCA, Fla., 12/3/84, Brennan v. State, 417 So.2d 1024, (Fla.

2nd DCA 1982) and Murphy v. State, 413 So.2d 1268, (1DCA, Fla. 1982), all of which involved aerial viewings of open fields. The Court further notes that this case is distinguishable from Randall v. State, 9 FLW 2354, November 16, 1984, in that the Defendant herein has manifested a reasonable expectation of privacy from aerial surveillance.

The Court does not reach the question of whether circling over the subject property at an altitude of 400 feet or less is in itself an invasion of a constitutionally protected area. It is therefore

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is granted, and the evidence seized pursuant to the execution of the search warrant is hereby suppressed.

DONE AND ORDERED in Chambers, at New Port Richey, Florida, this 19th day of December, 1984.

/s/ W. Lowell Bray, Jr.
W. Lowell Bray, Jr.
Circuit Judge

Copies forwarded to:

Marc Salton, Esq.

Office of the State Attorney

IN THE SUPREME COURT OF FLORIDA

MICHAEL A. RILEY, Petitioner,	)	
v.	)	Case No. 67,906
STATE OF FLORIDA, Respondent.	)	

MOTION FOR REHEARING

Pursuant to Florida Rule of Appellate Procedure, 9.330, Respondent moves for a rehearing of this Court's opinion of July 9th, 1987, on the grounds that this Court overlooked or misapprehended the following:

I.

Michael A. Riley did not exhibit a subjective expectation of privacy from aerial viewing.

And, the officers in the instant case were in a place where they had a right to

be when they spotted the contraband and accordingly, the viewing did not constitute a search within the context of the fourth amendment.

II.

As a basis for this Court's decision in Riley, the Court stated:

> Petitioner clearly exhibited a subjective expectation of privacy in the greenhouse and its contents and thus we concur with the trial court and the district court in this regard. The opacity of the greenhouse, the fence surrounding it, and the "KEEP OUT" sign all show petitioner's subjective expectation that the interior of the greenhouse would remain shielded from earth-bound and aerial observation. The fact that a few panels of the roof were missing does not alter our conclusion.
> Riley, page 7. (emphasis supplied)

The State does not agree that Riley exhibited a subjective expectation of privacy.

In California v. Ciraolo, 476 U.S. ___, 90 L.Ed.2d 210, 106 S.Ct. ___ (1986),

the United States Supreme Court took care to note that it was not addressing the issue of whether Ciraolo had manifested a subjective expectation of privacy from all observations of his backyard, or whether he instead manifested merely a hope that no one would observe his unlawful gardening pursuits. Id. at 90 L.Ed.2d 216.

Petitioner's greenhouse was located in a rural area. The photographs included in the record on appeal show that approximately 1/8th of the roof was uncovered and of the remaining portion the contraband could be readily viewed through 1/2 of one side of the roof. The remaining roofing was made of white fiberglass covering which allowed light to enter the structure. Further, the building was enclosed only on two sides. One of the remaining sides was open to an area of trees and shrubbery and the fourth

side was screened by a mobile home. The marijuana was clearly visible through the roof and the sides.

Here, as in Ciraolo, the petitioner's actions manifested no more than a hope that no one would observe his unlawful gardening pursuits.

III.

In Riley, this Court concedes that the officers were in a place they had a right to be. Nevertheless, the Riley decision suggests that this is not determinative under Katz v. United States 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967).

> "Under Katz, however, the determination of whether a police officer is in a place where he or she has a right to be is not always conclusive of whether the particular conduct constitutes a search. The essential teaching of Katz is that private activities do not lose their fourth amendment protection merely because technology exists which enables the police to view

> the activities from an otherwise nonintrusive vantage point."
> Id. at page 6.

First, Katz rested on a determination that the technology used allowed the officers to intercept a private conversation.

> "The critical facts in this case is that '[o]ne who occupies it, [a] telephone booth shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume' that his conversation is not being intercepted. Ante, at 582. The point is not that the booth is 'accessible to the public' at other times, ante, at 582, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable.
> Katz, at 361.

Nothing in the Katz opinion suggests that Katz' fourth amendment rights would have been violated had the officers simply overheard the conversation while standing outside the phone booth. In other words,

had the officers been in a place where they had a right to be, rather than intruding into the occupant's expectation of privacy, there would not have been a search within the context of the fourth amendment.

This Court, nevertheless, holds that even though the officers were in a place they had a right to be, the overflight was a violation of petitioner's reasonable expectation of privacy. Riley concludes that the officers were not in public navigable airspace because the helicopter was below the 500 foot minimum for fixed-wing aircraft in a non-congested area. Accordingly, the opinion urges that although petitioner may not have had a legitimate expectation that his greenhouse would not be viewed from a fixed-wing aircraft flying in public navigable airspace, he did have a reasonable expectation that its contents would not be

examined from a helicopter hovering below 500 feet.

This conclusion is contrary to the Supreme Court's decision in Dow Chemical Co. v. United States, 106 S.Ct. 1819 (1986). The officers here and the officers in Dow were in a place they had a right to be. The camera used by the agents in Dow allowed them to observe the Dow Chemical Plant at a closer point than a mere 1,000 feet. The maneuverability of the helicopter also allowed the officers in the instant case to observe Riley's greenhouse from a closer point that [sic] 1,000 feet.

Nevertheless, this Court in Riley attempts to distinguish the two based on the intrusive nature of the helicopter itself.

There is nothing in this record to support the conclusion that the helicopter caused any disturbance by hovering and

circling or that it was even noticed by the occupants. In fact, Detective Gell testified that they only flew over the property twice at a level of 400 feet. 400 feet is equivalent to a 40 story office building. Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations. "[W]e have never held that potential, as opposed to actual invasions of privacy constitutes searches for purposes of the fourth amendment." Dow Chemical Co. v. United States, 106 S.Ct. 1819 (1986); citing United States v. Karo, 468 U.S. 705, 712 (1984). On these facts, nothing in these photographs suggests that any reasonable expectations of privacy have been infringed.

Further, as the Court noted in Katz:

> "The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. . . . And a person can

> be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home."

Katz, 389 U.S. 350. fn.4, citing Griswold v. Connecticut, 381 U.S. 479 (dissenting opinion of Mr. Justice Black).

Thus, while the camera used in Dow may have been more surreptitious than the presence of a helicopter, this is a distinction without difference.

Further, from a technological standpoint, the concept of a helicopter was developed by Leonardo DiVinci in the 15th century and helicopters have been in use since the first quarter of this century. The use of helicopters is not a futuristic technological advance such as concerned the court in Katz.

> "But Justice Harlan's observations about future electronic developments and the potential for electronic interference with private communications, (cites omitted) were plainly not aimed at simple

visual observations from a public place."

* * *

"One can reasonably doubt that in 1967 Justice Harlan considered an aircraft within the category of future 'electronic' developments that could stealthily intrude upon an individual's privacy. Ciraolo, 90 L.Ed.2d 217, 218.

Beyond the fact that there is little support for this Court's conclusion that for an aerial viewing to be proper it must be from above minimum altitude levels for fixed-wing aircraft, there is also little support for this Court's conclusion that the helicopter in the instant case was not in public navigable airspace. See, 14 C.F.R §91.79(d), 49 U.S.C.A. §1301(26), and Griggs v. Allegheny County, 369 U.S. 84, 7 L.Ed.2d 585, 82 S.Ct. 531, rehr'g denied, 369 U.S. 857, 8 L.Ed.2d 16, 82 S.Ct. 931 (1962); see also, California v. Sabo, 95 L.Ed.2d 855 (1987) (White, B., dissenting) (Court of Appeals holding that

helicopter was not in navigable airspace at 400 feet is questionable.). In either case, the fact remains that the officers in the instant case were in a place that they had a right to be and could plainly spot the contraband without the aid of a 'futuristic technological development'.

This Court's concern that the contraband could not just as easily have been discerned by any person casually flying over is also contrary to the Court's holding in Ciraolo and Dow. Clearly in Ciraolo, the likelihood that a passenger on a plane might observe private activities, and might connect those activities with particular people, was simply too trivial to protect against. See, Ciraolo, 90 L.Ed.2d at 223 (Powell, L., dissenting). Further, the Court in Ciraolo also made it clear that a focused surveillance does not violate fourth amendment rights against search and

seizure.

It is clear that any helicopter pilot or passenger properly flying in this airspace could have seen everything that these officers observed. Based on similar facts, the Court in Ciraolo readily concluded that respondent's expectation that his garden was protected from such observation was unreasonable and was not an expectation that society was prepared to honor.

Justice Harlan's observations in Katz made it crystal clear that he was resting on the reality that one who enters a telephone booth is entitled to assume that his conversation is not been intercepted. Katz does not translate into a rule of constitutional dimensions that one who grows illicit drugs in his backyard is "entitled to assume" his unlawful conduct will not be observed by a passing aircraft -- or by a power company

repair mechanic on a pole overlooking the yard. Ciraolo, supra, 90 L.Ed.2d at 217. Accordingly, this Court has overlooked and misapprehended the fact that petitioner did not exhibit a subjective expectation of privacy that no one would observe his unlawful gardening pursuits, and that because the officers were in a place they had a right to be when they spotted the contraband, the overflight did not constitute a search within the context of the fourth amendment.

WHEREFORE, based on the foregoing reasons and citations of authority, respondent respectfully prays this Honorable Court to grant the instant Motion for Rehearing and reverse its decision.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Marc H. Salton, Esquire, 4911 C.R. 54, New Port Richey, Florida 33552, this _____ day of July, 1987.

/s/
OF COUNSEL FOR RESPONDENT